

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-5015

ORIGINAL

United States Court of Appeals

For the Second Circuit

In the Matter
of
DYNAMICS CORPORATION OF AMERICA,
Debtor.
No. 72 B 750

HOOS & CO.,
Claimant-Appellant,
against

DYNAMICS CORPORATION OF AMERICA,
Debtor-Appellee.

On Appeal from the United States District Court
for the Southern District of New York
(No. 72 B 150)

BRIEF OF APPELLEE
DYNAMICS CORPORATION OF AMERICA

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE:	
A. SUMMARY OF PROCEEDINGS	1
B. ISSUES	2
C. FACTS	3
ARGUMENT:	
I THE APPEAL SHOULD BE DISMISSED DUE TO LACK OF JURISDICTION OF THIS COURT.	11
II THE PURPORTED PROOF OF CLAIM IS UNTIMELY.	12
III THE WRITING SUBMITTED BY HOOS DOES NOT MEET THE SUBSTANTIVE REQUIREMENTS FOR A PROOF OF CLAIM.	19
IV THE WRITING WAS NOT DELIVERED TO A PARTY AUTHORIZED BY THE BANKRUPTCY ACT OR RULES TO RE- CEIVE OR FORWARD A PROOF OF CLAIM.	24
CONCLUSION:	27

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>In re High Point Seating Co.,</u> 181 F. 2d 747	23
<u>In re Mellen Manufacturing Co.,</u> 287 F. 2d 37 (3rd Cir., 1961)	16
<u>J. B. Orcutt Co. v. Green,</u> 204 U.S. (1907)	16
<u>In re Oscillation Therapy Products, Inc.</u> 94 F. Supp. 79 (S.D.N.Y. 1950)	16
<u>In the Matter of R.B.Rose Co., Inc.</u> 43 F. 2d 446, (S.D.N.Y. 1930)	17
<u>In re Superknit, Inc.,</u> 186 F. 2d 130 (3rd Cir., 1950)	16
<u>In the Matter of Trotwood Corporation,</u> 2 Bankruptcy Court Decisions 1668, Dec. 14, 1976	12
 <u>OTHER AUTHORITIES</u>	
<u>9 Collier 127</u> (14th Ed. 1975) ¶7.25	14
<u>12 Collier</u> (14th Ed. 1975) ¶509.10(1)	27
House Report No. 122 and Senate Report No. 751, 90th Cong., 1st Sess. (1967)	18

BANKRUPTCY ACT SECTIONSPage

44; 11 USC 72	25
338; USC 738	25
339; 11 USC 739	25
355; 11 USC 753	11,14,15,17,18
369; 11 USC 769	11

OTHER STATUTES

28 USC 331	14
28 USC 2075	15

FEDERAL RULES OF CIVIL PROCEDURE

Rule 50	13
---------	----

BANKRUPTCY RULES

107	13
115	13
214	25
301	11,13,15,17,18,19
302	13,17,25
403	13
509	17,25,26,27
607	13
752	13
802	13
906	11,13,15,17,18,19
923	13
924	13
11-27	24,26
11-29	24
11-33	11,12,13,15,17,18,19,25
11-63	11,12,13,15,17,18

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-5015

In the Matter
of
DYNAMICS CORPORATION OF AMERICA,
Debtor,
No. 72 B 750

HOOS & CO.,
Claimant-Appellant,
-against-
DYNAMICS CORPORATION OF AMERICA,
Debtor-Appellee.

BRIEF OF DEBTOR-APPELLEE DYNAMICS CORPORATION
OF AMERICA ON APPEAL TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

A. SUMMARY OF PROCEEDINGS

DYNAMICS CORPORATION OF AMERICA, Debtor-Appellee ("DCA"), submits this brief seeking to dismiss the appeal of HOOS & CO., Claimant-Appellant ("Hoos) from the decision and order of the Honorable Charles E. Stewart, District Judge dated May 17, 1977. Said decision and order dismissed the appeal of Hoos and affirmed the February 11, 1977 stipulated Findings of Fact, Conclusions of Law and Order of Bankruptcy Judge Edward J. Ryan, disallowing the \$200,000 claim of Hoos against DCA, a Chapter XI debtor.

B. ISSUES

1. Does this Court have jurisdiction to determine this appeal when no proof of claim was filed within the limitations as to time and amount?

2. Based on the stipulated findings of fact, whereby Hoos' representative stated in his letter to a Secretary of an Unofficial Creditors' Committee that he was not a partner of the holder of the notes in issue, the overall course of conduct between the parties, the concession by Hoos that there was no proof of claim form filed for the notes in question and the opposition to the motion by the Official Creditors' Committee, was there a demand in writing against the estate setting forth a creditor's claim executed by the creditor or his authorized agent, and substantially conforming to the designated official form?

3. Did the Court below abuse its discretion by denying a claim under all the facts, particularly where the Lipp letter was delivered to the Secretary of the then Unofficial Creditors' Committee, without a proof of claim for the notes in question and without the letter being forwarded to the Court?

C. FACTS

On June 16, 1975, over six months after the entry of an order confirming the plan of arrangement of DCA, and almost three years after the filing of the DCA Chapter XI petition for an arrangement, a motion was made by Hoos for an order allowing a claim in respect to \$200,000 principal amount of negotiable notes of DCA due 9/1/88, registered in the name of Hoos and held by the Carrier Trust with Bankers Trust Company ("Bankers Trust"), the present Trustee. (A-106)*

Until the end of 1971, Marine Midland Bank - New York ("Marine-New York") and Marine Midland Bank-Central ("Marine-Central") served as Co-Trustees of the Carrier Trust, which held \$200,000 principal amount of negotiable notes in question of DCA. Marine-New York acquired \$500,000 of the notes in a private placement in September of 1968. The \$200,000 in issue was held in the Carrier Trust and the remaining \$300,000 was held in other and custodian accounts, which ten purchasers, including Marine-New York, participated in this private placement. (A-106)

* References to the Joint Appendix are cited (A-).

In January, 1972, Marine-New York ceased acting as Co-Trustee of the Carrier Trust. Thereupon, Marine-Central became the sole Trustee. In the earlier months of 1972, the assets were, at the direction of Theodore Lipp ("Lipp"), formerly the Pension Trust Officer of Marine-New York, physically delivered to Marine-Central and for the most part, the securities in the trust were reregistered in the name of Marine-Central's nominee, Carsec & Co. (A-106)

On August 2, 1972, DCA filed its petition for an arrangement under Chapter XI. On August 8, 1972, Lipp attended a meeting of creditors of DCA. Lipp received a letter dated August 23, 1972 from Stanley Tulchin ("Tulchin"), Secretary of the then Unofficial Creditors' Committee of DCA and a man well experienced in claims practice and Chapter XI work. The letter stated that a meeting of the larger creditors had been held on August 8, 1972, a meeting Lipp attended, and to safeguard creditors' rights and facilitate negotiations with DCA, a committee representing various creditor groups was elected by those present. The letter continued:

"The Committee requests your executing the enclosed proof of claim in order that your claim may be filed with the Referee. It will be voted for a tentative trustee and to make the undersigned Committee official. It will not be voted in connection with any plan of arrangement. There will be no charge for filing of claim by the Committee or any of its counsel or representatives." (A-107)

The letter further requested that the proofs of claim be returned to the office of the Unofficial Creditors' Committee's secretary "promptly so that we can have it in time for the next meeting scheduled for September 11, 1972 before the Referee in Bankruptcy." (A-107)

By letter of September 8, 1972, Lipp replied to Tulchin's letter of August 23, 1972 advising him that:

"I am returning herewith our bank's proof of claim with regard to our holding Dynamics Corp. 7 1/2% notes due 9/1/88, of which \$200,000 is held in our nominee name of Hoos & Co., while an additional \$100,000 is held in our nominee name of Jaquith & Co. (A-107)

The proof of claim for these separate notes only was submitted by Lipp, and are not in issue in this case. In fact, a distribution on these notes was made by DCA pursuant to its plan of arrangement. (A-108)

The Lipp letter continued:

"These notes are held in our capacity as Trustee or Custodian for various pension funds. However, earlier this year we held an additional \$200,000 which was transferred to a successor Trustee, namely, Marine Midland Bank-Central, and are presently in their nominee, Carsec & Co. I am not a partner of Carsec & Co. but would appreciate your including this claim with ours, since the timing of your meeting Monday does not make it possible to get you their proof of claim. (Emphasis mine) (A-108)

No written proof of claim for the \$200,000 notes in issue was attached therein or ever subsequently sent to Tulchin, DCA or the Court by Lipp. Hoos has no record of a proof of claim being filed. No official proof of claim or document resembling a claim form separately describing the \$200,000 of notes was ever given to Tulchin or filed with the Court. As the basis of the claim, Hoos specifically relies on the September 8, 1972 letter of Lipp, never forwarded to the Court, and the accompanying proof of claim with respect to the \$300,000 of the notes of DCA not in issue here for which a distribution was made under the plan of arrangement. (A-108)

In the letter of September 8, 1972, Lipp further requested that Tulchin include on the mailing list of the Unofficial Creditors' Committee, Ronald Hummel ("Hummel"), Vice President of Marine-Central. (A-108)

Hummel sent a letter on September 14, 1972 to Tulchin which stated that he understood that Lipp advised Tulchin that Marine-Central holds \$200,000 of the 7 1/2% notes due 9/1/88. He further stated that the notes are reregistered in Marine-Central's nominee, which is Carsec & Co. and requested subsequent mailings from the Creditors' Committee. Commencing in October 1972, Hummel regularly received communications from the

Creditors' Committee. At no time did Hummel submit a proof of claim for the \$200,000 notes in issue. (A-109)

Proofs of claim received in response to Tulchin's letter to creditors were sent by Tulchin to the Bankruptcy Court for filing. Included therein, was the proof of claim for \$300,000 which Lipp sent to Tulchin for other notes in other custodian and trust accounts of Marine-New York. No proof of claim for the \$200,000 Carrier notes in issue was given to Tulchin or filed by Hoos, Carsec & Co. or anyone else. No proof of claim is on file with the Court, nor is there any record of a proof of claim in this matter ever being received. A search of the records of Marine-New York and Marine-Central has failed to disclose a copy of a proof of claim for the \$200,000 Carrier notes. The September 8, 1972 Lipp letter was never sent to the Court or DCA. (A-108)

At the first meeting of creditors on September 11, 1972, Tulchin was elected standby trustee and the Unofficial Creditors' Committee was formally elected. (A-109)

Schedules of creditors were properly filed by DCA on October 5, 1972 and Marine Midland Grace and Trust, whose nominees are Hoos & Co. and Jaquith & Co., was scheduled as a creditor for \$500,000, plus interest for an aggregate total of \$515,625.00 (A-109)

As of September 30, 1973, Bankers Trust replaced Marine-Central as Trustee of the Carrier Trust and the assets of the trust (including the Carrier notes registered in the name of Hoos) were physically delivered to Bankers Trust. Bankers Trust claims to have unsuccessfully attempted to have registration of the notes transferred to its nominee. Bankers Trust, not a party to these proceedings, prior to confirmation and after confirmation, has not filed a proof of claim to the negotiable notes in question. (A-109-110)

By letter of December 31, 1973, Patrick Dome, Controller of DCA, at the behest of an accountant selected with approval by the Official Creditors' Committee, S.D. Leidesdorf & Co., requested from Marine-New York "information regarding our indebtedness to you" in connection with the examination of our accounts. By letter of March 12, 1974, Fred W. Hildum, Trust Operation Officer of Marine-New York, reaffirmed Lipp's letter of September 8, 1972 by stating that DCA owed Marine-New York \$300,000 in specific notes (for which a separate proof of claim had been filed and for which the appropriate distribution was made under the plan of arrangement). No mention whatsoever is made in the reply letter of the \$200,000 in negotiable Carrier notes which is the subject matter of this proceeding. (A-110)

On November 27, 1974, an order confirming the DCA plan of arrangement was signed by Bankruptcy Judge Edward J. Ryan. No proof of claim in regard to these notes was filed within thirty (30) days after the date of mailing of the notice of the confirmation of the plan of arrangement to creditors. Over six (6) months after confirmation on June 16, 1975, Hoos made this motion for allowance of the claim without naming Tulchin, the Secretary of the Official Creditors' Committee, or the Committee itself as a respondent. (A-110)

Nevertheless, the attorneys for the Official Creditors' Committee appeared at the Bankruptcy Court hearing on the motion and opposed the relief sought by Hoos. The Committee stated that Tulchin was under no duty to Hoos to forward the September 8, 1972 scrambled letter of Lipp for the notes in issue and further argued that no proof of claim for the notes in issue was ever subsequently given to Tulchin. The Committee fully supported the position of DCA in argument before Bankruptcy Judge Edward J. Ryan. (A-112)

At the hearing on Hoos' motion, the Court stated on the record that the "mere fact that the debtor scheduled" the debts evidenced by the notes in question on this motion "does not render any greater force to

the proposed informal proof of claim here. The debtor is under no obligation, in fact it would be improper for the debtor, to arrange in the order of confirmation for the payment to scheduled creditors of sums due to them, absent the filing of a proof of claim timely." (A-111)

Hoos has not asserted and does not assert that the motion dated June 16, 1975 is to be construed as a claim or amendment of claim, nor does it assert that a claim or amendment of claim was filed by it after the confirmation of the plan of arrangement herein. Rather, as the basis of its claim herein, Hoos relies solely on the September 8, 1972 letter from Lipp, and the accompanying proof of claim for \$300,000 for separate notes not in issue in this case, which latter claim has been paid in this proceeding pursuant to the DCA plan of arrangement. (A-111-112)

ARGUMENT

POINT I

THE APPEAL SHOULD BE DISMISSED
DUE TO LACK OF JURISDICTION OF
THIS COURT

The Bankruptcy Court, District Court and Court of Appeals retain jurisdiction until the final allowance or disallowance of all claims affected by the DCA arrangement which have been filed within the limitations as to time and amount prescribed by Section 355 and Section 369 (11 USC 753, 11 USC 769) of the Bankruptcy Act, but have not been allowed or disallowed prior to confirmation. Since Hoos did not file a claim for the \$200,000 notes in issue, this Court should dismiss the appeal due to lack of jurisdiction.

Bankruptcy Rules 11-33(a,b) 11-63(2), 906(b) and 301(a) apply to claims, are a clear recent statement of the law and an absolute bar to untimely and improper claims and their amendments. When Sections 355, 369 (11 USC 753, 11 USC 769) and the aforementioned Rules are read together, it is clear that Hoos, which stipulated that it never filed a proof of claim for the \$200,000 notes in issue on appeal, is attempting to amend its separate claim of \$300,000 (for which it received the proper distribution) upward to \$500,000 and circumvent

the clear words and meaning of the law on claims and jurisdiction of the Court. See also In The Matter of Trotwood Corporation, 2 Bankruptcy Court Decisions 1668, December 14, 1976.

DCA will show in Points II-IV of this brief that substantively there was no claim demand against DCA and that if any vague demand attempt was made by Hoos it was made to a party not authorized by the Bankruptcy Act and Rules to receive a claim. Therefore, the appeal should be dismissed due to lack of jurisdiction.

POINT II

THE PURPORTED PROOF OF CLAIM IS UNTIMELY

Bankruptcy Rule 11-33(b)(2) states:

"(2) Time for Filing. A claim, including an amendment thereof, must be filed before confirmation of the plan . . ."

Congressional intent to have proofs of claim and their amendments filed prior to the confirmation of a Chapter XI plan of arrangement and to disallow all late amendments of claims is further manifested by Rule 11-63(2) which states:

Rule 11-63
General Provisions

Part IX of the Bankruptcy Rules applies in Chapter XI cases, except that:

...(2) The references to various rules in 906(b) shall also include a reference to Chapter XI Rule 11-33(b)(2)"

Upon referring to Rule 906(b) on enlargement the pertinent portion of the rule states:

"(B) Enlargement. When by these rules or by a notice given thereunder or by the order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion. . .

(2) upon application made after the expiration of the specified period permit the act to be done when the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 107(b)(2), 115(b)(4) insofar as it makes Rule 50(b) of the Federal Rules of Civil Procedure applicable in bankruptcy cases, 302(e)403(c), 607, 752(b), 802, 923 and 924, except to the extent and under the conditions stated in them." (Emphasis supplied)

Therefore, it is crystal clear that upon reading Rule 11-33(b)(2)

("A claim, including an amendment thereof, must be filed before confirmation... (Emphasis supplied)

together with Rule 906(b)(2) there is no discretion by the Court to allow a late amendment to a claim.

The Advisory Committee Note to Rule 906(b) clearly indicates:

"In the interest of expediting proceedings in bankruptcy, the last clause of subdivision (b) adds a number of acts for which more time cannot be granted of the first part of the subdivision... Similar considerations, underlie the limiting on the extension of time for filing claims..."

The sole basis for the Hoos claim as stipulated is the Lipp letter which in Point III will substantively be shown not to constitute a proof of claim. The argument Hoos makes that there is a unified claim is absurd. The clear intent of the drafters of this rule to disallow untimely claims and amendments is manifested in the Advisory Committee's Note which states:

"Subdivision (b)(2) of this rule is derived from Section 355 of the Act. It also clears up an ambiguity not answered by the statute respecting the status of amendments to proofs of claim. Under this rule an amendment must be filed within the same time as the original proof of claim and it is not possible to obtain an extension of time based on the amending process."

Hoos clearly ignores the precise language of Rule 11-33(b)(2) as well as the Advisory Committee's Note on the time limit for filing a proof of claim. 9 Collier 127 (14th Ed. 1975) ¶7.25.

The new rules and forms were not lightly assembled. The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States was established in 1960 28 U.S.C. 331. This Committee, chaired by Judge Philip Foreman, was a distinguished one as was its parent, the Standing Committee on Rules of Practice and Procedure. The Committee submitted its report and following approval by the Standing Committee and the Judicial Conference itself, it was then sent to the Supreme Court.

By virtue of its rule-making authority, 28 U.S.C. 2075, the Supreme Court entered its order of adoption and forwarded the rules and forms to the Congress and they subsequently became effective.

The cases Hoos claims to rely on are no longer applicable since the enactment and amendment of Section 355, 11 USC 753, and the promulgation of Rules 11-33 (a,b), 11-63(2), 906(b) and 301(a) supercede the cases. However, even the cases cited by Hoos clearly enhance DCA's stance and destroy the Hoos argument, since in these cases there was an actual and intended timely delivery or timely filing with a party authorized (trustee) by the Bankruptcy Act and case law to receive or forward a proof of claim. In none of the cases cited by Hoos was an actual proof of claim given to a Creditors' Committee, Secretary to an Unofficial Creditors' Committee, or its agent. Furthermore, Hoos cites no authority for a scrambled letter which purports to resemble an official proof of claim and which was delivered to the Secretary of the Creditors Committee to be allowed as a claim. The Hoos position becomes even more untenable when the fact is that the Official Creditors' Committee opposed the Hoos motion stating, the Secretary had no responsibility under the circumstances. Bankruptcy Rule

509(c) as applied to Chapter XI is consistent with the cited cases and would not, under any circumstances, permit a mistaken delivery of a proof of claim to a Creditors' Committee's Secretary to be allowed.

Claimant inappropriately cites J.B. Orcutt Co. v. Green, 204 U.S. 96 (1907) where there was an actual proof of debt delivered to the trustee in bankruptcy within the applicable time period.

In re Oscillation Therapy Products, Inc., 94 F. Supp. 79 (S.D.N.Y. 1951) clearly is distinguishable since delivery of proofs of claim was made to an attorney for the petitioning creditors in an involuntary bankruptcy, who shortly afterwards became the trustee. This trustee subsequently brought the proofs of claim to the first meeting but neglected to file all the proofs of claim given to him until after the time expired.

The recent statutory law is the result of abuses which Congress has continuously sought to avoid. Expeditious administration and rehabilitation of Chapter XI debtors requires a definite cutoff date past which claims may not be filed. In re Mellen Manufacturing, 367 F. 2d 37 (3rd Cir., 1961); In re Superknit, Inc., 186 F. 2d 130 (3rd Cir., 1950). This is so clearly the Congressional

intent as to eliminate any common law equity power of the court to extend the time. In the Matter of R.B. Rose Co., Inc. 43 F. 2d 446 (S.D.N.Y. 1930). DCA cites these cases to show the state of the law prior to the amendment of Section 355, 11 USC 753, and the promulgation of Rules 11-33(a,b), 11-63(2), 906(b) and 301(a). The present law applicable absolutely bars improper and untimely claims.

The September 8, 1972 letter by Lipp to Tulchin read by itself and in context of subsequent events can in no way be substantively considered a proof of claim even if delivered to an authorized party - which it was not.

As will be discussed further in Point IV, based on rules 11-33(b)(1), 302(b) and 509(a), a proof of claim shall be filed with the Bankruptcy Judge. In case of error in filing, Bankruptcy Rule 509(c) authorizes, in the interest of justice and at the discretion of the Bankruptcy Judge, a paper intended to be filed but erroneously delivered to the trustee, (debtor-in-possession) or receiver, or the attorney for either to be deemed filed as of the date of its original delivery. In the case at bar, there was no timely delivery to an authorized or unauthorized party

(discussed infra Point IV) of a paper which substantively (discussed infra Point III) could be considered a proof of claim.

This sophisticated appellant had no lack of time within which to file a proof of claim and to check whether one had been properly filed. (A-126)

Under Section 355, 11 USC 753, prior to 1967, only six months was given to a Chapter XI case for creditors to file a proof of claim. The general purpose of the 1967 amending legislation, to Section 355 (11 USC 753), extending the time to file a proof of claim, was explained in House Report No. 122 and Senate Report No. 751, 90th Cong., 1st Sess. (1967) where it states:

"However, in order to avoid imposing onerous and unrealistic burdens on creditors which may prevent them from participating and thereby provide a windfall or undeserved benefit to the debtor, the bill enables creditors to file their claims up to the date of confirmation."

H.R. 2519. . . would carry the Congressional objective. . . by requiring every creditor to file a claim before being permitted to participate under a confirmed arrangement."

Under the 1967 amendment as well as rules 11-33(a,b), 11-63(2), 906(b) and 301(a), it is clear that the liberal time to file a proper claim up to the date of the confirmation with certain exceptions

inapplicable here. The clear Congressional intent is also that a creditor still has a firm responsibility to file a proof of claim over a proscribed but long period of time with the proper party. This responsibility has not been met by Hoos which had over two years to file. The allowance of this purported claim would be a distortion of the intent of the Bankruptcy Act and would be disruptive of the orderly administration and rehabilitation of Chapter XI debtor estates, particularly in the formulation and filing of a viable plan of arrangement.

POINT III

THE WRITING SUBMITTED BY HOOS DOES NOT MEET THE SUBSTANTIVE REQUIREMENTS OF A PROOF OF CLAIM

Based on Rule 11-33(a) one must refer to Bankruptcy Rule 301 in Chapter XI cases, for the form and content of a proof of claim. Rule 301(a) states:

"(a) Form and Content; Who May Execute. A proof of claim shall consist of a statement in writing setting forth a creditor's claim "and...shall be executed by the creditor or his authorized agent"...and "shall conform to Official Form."

The combination of Rule 301(a) which deals with form and content and Rules 11-33(a,b), 11-63(2) and 906(b) which require proofs of claim and their amendments to

be timely filed before confirmation with an authorized party constitutes the basic requirements Hoos had to meet.

It is clear by Lipp's letter of September 8, 1972 to Tulchin that Lipp had no intention of filing a proof of claim with regard to the \$200,000 negotiable notes and that the letter cannot be considered part of a unified claim. Lipp stated that:

"I am returning herewith our Bank's proof of claim with regard to our holding Dynamics Corp. 7 1/2% Notes due 9/1/88, of which \$200,000 is held in our nominee's name, Hoos & Co., while an additional \$100,000 is held in our nominee's name, Jaquith & Co." (A-109)

The proof of claim for the separate notes are not in issue in this case and these claims were paid pursuant to DCA's plan of arrangement:

"These notes are held in our capacity as Trustee or Custodian for various pension funds. However, earlier this year we held an additional \$200,000 which was transferred to a successor trustee, namely Marine Midland-Central and are presently in their nominee, Carsec & Co. I am not a partner of Carsec & Co." (Emphasis supplied) (A-108)

It has been stipulated that no written proof of claim for these notes was attached thereto or subsequently sent to Tulchin or the Court by Lipp. Hoos has no record of a proof of claim being filed.

Tulchin, highly experienced in representing creditors, was not asked to, and had no authority to actually execute a proof of claim particularly since Lipp knew that the notes had been physically transferred to Marine-Central as sole trustee. Hoos concedes that Lipp, at the time, thought the negotiable notes had been reregistered in their nominee, Carsec & Co. (A-108)

In no possible way can this reference to a debt allegedly owed by DCA to a third party for which the writer (Lipp) did not have or intend to exercise authority to execute a proof of claim, be read to comply substantively and substantially to official form No. 11-14 entitled "proof of claim". Lipp's letter puts no one on notice of a claim. To further indicate Hoos did not intend or actually file a proof of claim by the September 8, 1972 letter, subsequent events bear close scrutiny.

In the letter of September 8, 1972, Lipp requested that Tulchin include Hummel, Vice President of Marine-Central on the mailing list of the Creditors' Committee. (A-108)

Hummel wrote on September 14, 1972 to Tulchin that he understood that Lipp "advised you that we hold \$200,000 of the 7 1/2% notes, due 9/1/88. These currently are registered in our nominee, which is Carsec & Co." (A-109)

"Please make certain that my name appears on all of your subsequent mailings as it is important that we be apprised of all future developments." (A-109)

The correspondence reaffirms that no proof of claim was filed, that Lipp merely advised Tulchin that Hummel (Marine-New York) had possession of notes and that Lipp, at the time, felt that he had no authority except to ask that notice of subsequent Chapter XI meetings be forwarded to Hummel. (A-109)

It is quite clear that the misguided attempt to have the September 8, 1972 letter declared a proof of claim is a sham, a cover-up for neglect and an after-thought.

To further show Lipp's lack of intent and authority to file a proof of claim by letter of December 31, 1973, Patrick Dorme, Controller of DCA, at the behest of an accountant approved by the Official Creditors' Committee, S.D. Leidesdorf & Co., requested from Marine-New York specific information regarding "our indebtedness to you... in connection with the examination of our accounts." (A-110)

By letter of March 12, 1974, Fred W. Hildum, Trust Operation Officer of Marine-New York reaffirmed Lipp's letter of September 8, 1972 by stating that DCA owed Marine-New York \$300,000 in specified notes (for which a proof of claim had been filed.) No mention whatsoever

is made of the \$200,000 in separate negotiable Carrier Notes which is the subject matter of this proceeding. Neither DCA nor the accountants were under a duty to clear up any possible discrepancy. (A-110-111)

District Judge Stewart noted that Hoos inappropriately cited In Re High Point Seating Co., 181 F. 2d 747 for support on the question of a claimant's response to an auditor's letter. (A-126) In High Point Seating Co., the claimant actually brought to the attention of the accountants that it was due money. Hoos conveniently omits to tie in the fact as stated that it never indicated to DCA and S.D. Leidesdorf that the notes in question were due.

Tulchin as Secretary of the then Unofficial Creditors' Committee clearly had no duty to forward this September 8, 1972 letter to the Court and have it filed as a proof of claim. The fault lies with the sophisticated Hoos who has been guilty of three years of inexcusable neglect in not filing a proof of claim, not advising the subsequent trustees, Marine-Central and Bankers Trust to do the same, and in not checking with the Court as to whether a timely and proper proof of claim had been filed. (A-126)

Marine-Central, the sole trustee of the Carrier Trust from early 1972 to late 1973 which thought it was the proper party to file a proof of claim, but never did, likewise cannot be absolved from its negligence in not filing a claim.

POINT IV

THE WRITING WAS NOT DELIVERED TO
A PARTY AUTHORIZED BY THE BANKRUPTCY
ACT OR RULES TO RECEIVE OR FORWARD
A PROOF OF CLAIM

District Judge Stewart and Bankruptcy Judge Ryan correctly find that the delivery of a purported proof of claim to the Secretary of a then Unofficial Creditors' Committee is not a delivery to a party authorized by the Bankruptcy Act or Bankruptcy Rules to receive a proof of claim. (A-123-A-126) It is not open to doubt that in a pending proceeding under Chapter XI, the Creditors' Committee cannot be equated with the trustee in bankruptcy, debtor-in-possession, receiver or their attorney, as an officer of the Court. The function of the Committee and its agent according to Rule 11-29 is as follows:

"(a) Functions. The Committee selected pursuant to Rule 11-27 may consult with the trustee, receiver, or debtor-in-possession in connection with the administration to the estate, examine into the

conduct of the debtor's affairs and the causes of his insolvency or inability to pay his debts as they mature, consider whether the proposed plan is for the best interests of creditors and is feasible, negotiate with the debtor concerning the terms of the proposed plan, advise the creditors of its recommendations with respect to the proposed plan, report to the creditors concerning the progress of the case, collect and file with the Court acceptances of the proposed plan, and perform such other services as may be in the interests of creditors."

The Rule which is derived from Sections 338, 339 and 44b of the Act and Bankruptcy Rule 214 clearly indicates the Committee's functions "in the interests of creditors" and that it certainly does not act in behalf of the debtor.

Pursuant to Rule 11-33(b)(1) and Bankruptcy Rules 302(b) and 509(a), a proof of claim "shall be filed with the referee." The drafters of the rules did realize that certain mistakes can be made, and therefore, pursuant to Rule 509(c) as applied to Chapter XI cases if there is an error in filing or a paper intended to be filed is erroneously delivered to the trustee (debtor-in-possession) or receiver of the debtor or the attorney for either of them, this paper shall be transmitted to the proper person. "In the interests of justice, the Court may order, in its discretion, that the paper shall be deemed filed as of the date of its original delivery." This section clearly

contemplates a good faith completed form bearing a close resemblance to an official proof of claim be erroneously delivered to one of the above-named fiduciary parties. The courts below properly exercised their discretion in disallowing the claim.

Hoos urges the Court to take cognizance of the fact that Tulchin, subsequent to the time of his receiving the letter, was elected standby trustee pursuant to Rule 11-27. Assuming, but not conceding, that Lipp's scrambled letter was a mis-delivered proof of claim, it is clear that Tulchin, who was elected standby trustee subsequent to receiving the letter, was under no duty to forward a proof of claim and the estate cannot be held chargeable for the claim. (A-124) Rule 509(c) provides a way out for actual claims erroneously filed with an active fiduciary (trustee, debtor-in-possession or receiver or the attorney for them) but does not permit a further erosion of the clear intent of Rule 509(a) that proofs of claim shall be filed with the Bankruptcy Judge and not with a standby trustee.

Upon becoming standby trustee, Tulchin had no functions in the Chapter XI case. According to the Advisory Committee's Note to Rule 11-27:

"The nominated standby trustee does not function during the pendency of the Chapter XI case since as the title indicates this is a provisional nomination or election. It is only when the Chapter XI case is converted to bankruptcy that he proceeds to qualify (see Bankruptcy Rule 122), take office and administer the ensuing bankruptcy estate. In Chapter XI the only proper officers are a previously elected and qualified trustee in a pending bankruptcy case or, if none, a receiver appointed by the Court or the debtor-in-possession."

The delivery of the scrambled letter to Tulchin, Secretary of the Creditors' Committee, was not delivery to one of the fiduciary parties contemplated by the drafters of Rule 509(c). 12 Collier, Bankruptcy 14th Ed. 1975, 509.10(1) This recently enacted rule was carefully drafted, and took into account case law, thus making it an up-to-date statement of the law. It specifically states who is a fiduciary to receive a mis-delivered proof of claim, but carefully omits creditors, Creditors' Committees or Secretaries of the Creditors' Committee.

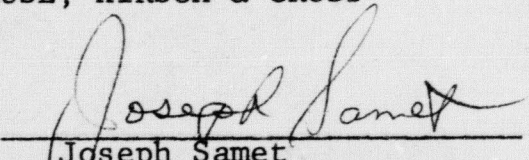
CONCLUSION

All obvious considerations of justice and equity are weighed in favor of DCA and the law is quite clear that the appeal from the order and decision of the Honorable

Charles E. Stewart must be denied and the case dismissed.

Respectfully submitted,

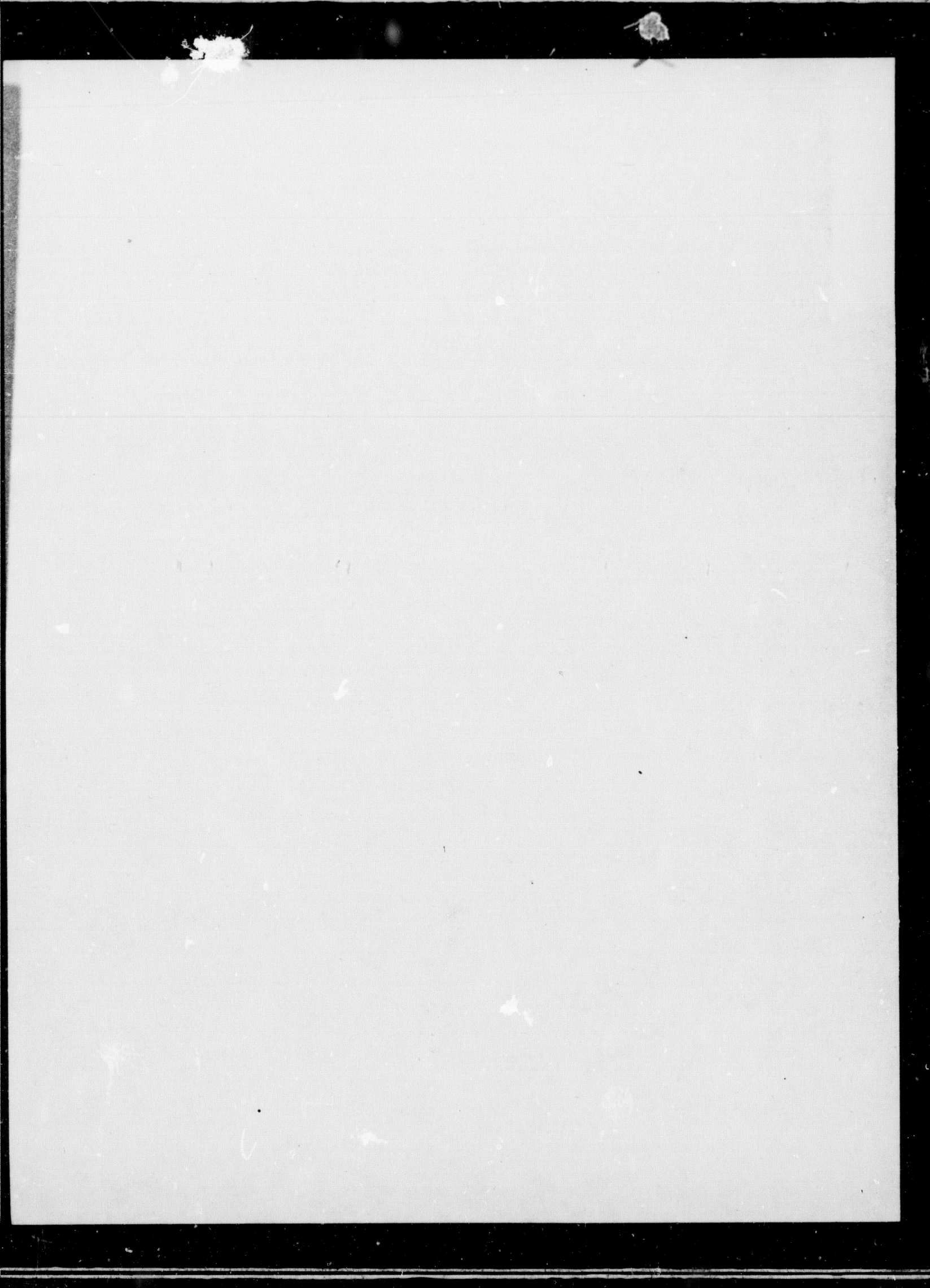
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September 30, 1977





Service of 3 copies of the
within Brief is hereby
admitted this 30th day of
Sept 1977

Signed Arthur J. Crowell

Attorney for Claimant-Appellant